

The 28th step - EU contract law one step closer to reality

The European Commission has published for consultation a “feasibility study” by an Expert Group which includes a 189-article draft code that could become a new body of contract law (the European Contract Law). It would stand along-side the contract laws of the existing 27 EU Member States as well as international law sources such as the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG).

The European Parliament will be voting in plenary in June on this subject, and a formal proposal by the Commission is currently predicted to be made before the end of the year.

Whilst the point is not settled, it would seem most likely that any Commission proposal would centre on an EU Regulation which would create an optional European Contract Law. Currently, this optional instrument would be available for both business to consumer (b2c) and business to business contracts (b2b). A fundamental reason for the proposal is to facilitate cross-border trade within the EU, but as matters currently stand the European Contract Law would also be available for purely domestic agreements and international agreements.

The European Contract Law provides “a self-standing and comprehensive text covering most aspects of a contractual relationship” covering contracts for the sale of goods and service contracts associated with such sales.

Whilst the European Contract Law would be optional, the scope of this option remains open. It is not clear whether its adoption by parties would mean all of its articles must be used – the all or nothing approach – or whether parties can pick and choose articles. Article 7 identifies that “Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules”, and the “Parties may exclude the application of any of the following rules, or derogate from or vary their effects, except as otherwise

provided”. This wording suggests that in adopting the European Contract Law parties would need to adopt all of the articles. In relation to b2c agreements, there is always the question as to whether the consumer has any options at all over the contractual terms. Consistently the modern ‘classic’ example given is the click to accept terms when acquiring products on-line. It has been suggested that in such situations it may become mandatory that consumers have the option of clicking on the ‘blue-flag’ (i.e. the EU flag) to accept a European Contract Law agreement, as an alternative to the default offered by the supplier. We are given to understand that the Commission considers that the European Contract Law could become the favoured form of contract in a b2c environment as its benefits become known. This outcome is more plausible if consumer representative bodies would support the European Contract Law as currently foreseen, although at this stage we understand such organisations are at best neutral towards the proposal.

Perhaps the most enigmatic and novel element of the European Contract Law is choice of law and enforcement. Because the European Contract Law would be a new body of law, sitting along-side the national laws of the existing 27 EU Member States it is sometimes referred to as the 28th regime. The European Contract Law would not be alien because the European Contract Law is created out of a five year project that ended in 2009 to compare the laws of the EU Member States and to establish a common legal framework of contract law. Consequently, many of the articles, particularly those relating to b2c agreements, will be very familiar to European lawyers. However, formally expressed it would be a distinct body of law and pursuant to Article 1 the European Contract Law “is to be interpreted and developed autonomously” and “issues within the scope of the [European Contract Law] but not expressly settled by it are to be settled in accordance with the principles underlying it *without recourse to national laws*” (emphasis added). Three issues arise from this.

First, under EU law only the European Court of Justice has the power to interpret EU law. As the European Contract Law would be EU law, it follows at first sight that the forum for litigation in relation to an agreement governed by European Contract Law would be the European Court of Justice in Luxembourg. However, that is entirely unworkable as an outcome. Therefore and second, national judges would be expected to have jurisdiction over such litigation pursuant to usual choice of forum and choice of law rules. To what extent, however, can it be expected that national judges can deliver a ruling without naturally (if not expressly) using their knowledge and experience of the national law of the country in which they reside? This possible national interpretive bias can lead to different outcomes for similar cases, which would be an unwelcome outcome. Third, as and when the European Contract Law came into effect there would be no jurisprudence for the first few years, so parties using the European Contract Law would be contracting without knowing the full consequences of their legal obligations. Guidance by the European Commission could be produced which might ameliorate this third issue.

The European Contract Law would be potentially useable only for contracts for the sale of goods and service contracts associated with such sales. In relation to service contracts associated with such sales, by Article 150 those articles in Part V relating to “obligations and remedies of the parties to a related services contract” do not apply to “transport services, training services, telecommunications support services, or financial services”.

The European Contract Law is a possibility that is moving towards becoming a probability. The prospect of a European Contract Law has been mooted since at least 1989 when the European Parliament tabled a motion calling for such a law, and even if as expected the Commission does propose a Regulation it cannot be stated with certainty that this proposal would be adopted or end-up being what is described in this client update. Despite this lack of certainty corporations, particularly those in the b2c space, should take seriously the recent development and should examine the implications for their business of the possibility of a novel body of EU contract law.

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